Supreme Court, U. S.
FILED
MAR 8 1979
MICHAEL RODAK, JR., CLERK

No. 78-808

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

NORMAN J. BOLES AND MARGARET GONZALES, AND ALL OTHERS SIMILARLY SITUATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLANT

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

WILLIAM KANTER
SUSAN A. EHRLICH
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitutional and statutory provisions involved	2
Statement	6
Summary of argument	10
Argument:	
I. The marriage requirement of eligibility does not unconstitutionally discriminate against illegitimate children	12
A. The mother's benefit is designed to provide support for the wage-earner's spouse	14
B. The benefit is not designed to permit the entitled child's mother to care for him	17
C. The eligibility requirements for mothers' benefits have at most an incidental effect on illegitimate children	23
D. The statute is substantially related to important goals	25
II. Retroactive monetary relief is barred by sovereign immunity	32

Argument—Continued Page

III. The district court lacked authority to award relief to a nationwide class including persons who have not filed any claim with the Secretary 37

Conclusion 41

Appendix A 1a

Appendix B 3a

CITATIONS

Cases:

Califano v. *Aznavorian*, No. 77-991 (Dec. 11, 1978) 25
Califano v. *Elliott*, cert. granted, No. 77-1511 (Oct. 2, 1978) 37
Califano v. *Goldfarb*, 430 U.S. 199, affirming 367 F. Supp. 981 ..... 14, 36
Califano v. *Jobst*, 434 U.S. 47 .....7, 12, 14, 15, 17, 24, 25
DeLao v. *Califano*, 560 F. 2d 1384 34
Duarte v. *United States*, 532 F. 2d 850.... 34
Edelman v. *Jordan*, 415 U.S. 651 36
Gomez v. *Perez*, 409 U.S. 535 ..... 18, 23
Jimenez v. *Weinberger*, 417 U.S. 628....9, 14, 16, 30
Johnson v. *Mathews*, 539 F. 2d 1111..... 34
Labine v. *Vincent*, 401 U.S. 532 16
Lalli v. *Lalli*, No. 77-1115 (Dec. 11, 1978) 15, 26, 27
Levy v. *Louisiana*, 391 U.S. 68 23
Mathews v. *DeCastro*, 429 U.S. 181....12, 14, 15, 17
Mathews v. *Lucas*, 427 U.S. 495.....8, 15, 16, 17, 23, 26, 28, 29, 30, 32

Cases—Continued Page

McLucas v. *DeChamplain*, 421 U.S. 21.... 2
Miller v. *Youakim*, No. 77-742 (Feb. 22, 1979) 21
Milliken v. *Bradley*, 433 U.S. 267 36
New Jersey Welfare Rights Organization v. *Cahill*, 411 U.S. 619 ..... 18, 23
Soriano v. *United States*, 352 U.S. 270.... 35
Stone v. *Powell*, 428 U.S. 465 36
Tatum v. *Mathews*, 541 F. 2d 161 34
Trimble v. *Gordon*, 430 U.S. 762 .....9, 13, 26
United States v. *King*, 395 U.S. 1 35
United States v. *Sherwood*, 312 U.S. 584.. 35
United States v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33 36
United States v. *United Fidelity & Guaranty Co.*, 309 U.S. 506 33
United States v. *Testan*, 424 U.S. 392..33, 34, 35
Vance v. *Bradley*, No. 77-1254 (Feb. 22, 1979) 26
Washington v. *Davis*, 426 U.S. 229 24
Weber v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 16
Webster v. *Fall*, 266 U.S. 507 36
Weinberger v. *Salfi*, 422 U.S. 749.....6, 7, 12-13, 15, 17, 30, 37, 38
Weinberger v. *Wiesenfeld*, 420 U.S. 636, affirming 367 F.Supp. 981.....6, 9, 10, 17, 19, 20, 21

Constitution, statutes and rule:

Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 33

Constitution, statutes and rule—Continued Page

Social Security Act, 42 U.S.C. 301 *et seq.*:

Section 202(d), 42 U.S.C. 402(d).... 16
Section 202(g), 42 U.S.C. 402(g)..7, 32, 33
Section 202(g)(1), 42 U.S.C. 402 (g)(1) 2, 3, 6, 15, 38
Section 202(g)(1)(F), 42 U.S.C. 402(g)(1)(F) 3, 6
Section 202(s)(1), 42 U.S.C. 402 (s)(1) 7
Section 203, 42 U.S.C. 403 7
Section 204(a), 42 U.S.C. 404(a).... 12, 34, 35, 36
Section 205(g), 42 U.S.C. 405(g)....2, 4, 12, 33-34, 39, 40
Section 205(g)(1), 42 U.S.C. 405 (g)(1) 38
Section 205(g)(1)(E), 42 U.S.C. (1970 ed.) 402 (g)(1)(E) 18
Section 205(h), 42 U.S.C. 405(h).... 37, 39
Section 215, 42 U.S.C. 415 8
Section 215(a), 42 U.S.C. 415(a).... 28
Section 216(c), 42 U.S.C. 416(c).... 6
Section 216(d), 42 U.S.C. 416(d).... 7, 8
Section 216(d)(3), 42 U.S.C. 416 (d)(3) 5, 7
Section 216(e), 42 U.S.C. 416(e).... 6
Section 216(h)(1), 42 U.S.C. 416 (h)(1) 6, 24
Section 216(h)(1)(A), 42 U.S.C. 416(h)(1)(A) 5
Section 216(h)(3), 42 U.S.C. 416 (h)(3) 8

Constitution, statutes and rule—Continued Page

Pub. L. No. 92-603, Section 114(c), 86 Stat. 1348 18
28 U.S.C. 1331 .....37, 39, 40
42 U.S.C. 1383(b) 35
Fed. R. Civ. P. 54(c) 39

Miscellaneous:

H.R. Doc. No. 110, 76th Cong., 1st Sess. (1939) 22
H.R. Rep. No. 92-231, 92d Cong., 1st Sess. (1971) 18

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-808

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

NORMAN J. BOLES AND MARGARET GONZALES, AND ALL OTHERS SIMILARLY SITUATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the district court (J.S. App. 3a-28a) is not reported.

JURISDICTION

The order of the district court, holding unconstitutional 42 U.S.C. 402(g)(1), was entered on June 23, 1978. A notice of appeal to this Court was filed

on July 20, 1978 (J.S. App. 29a-30a). On September 12, 1978, Mr. Justice Powell extended the time for docketing the appeal to and including November 17, 1978, and the appeal was docketed on November 15, 1978. This Court noted probable jurisdiction on January 22, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975); *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975).

QUESTIONS PRESENTED

1. Whether Section 202(g)(1) of the Social Security Act violates the Due Process Clause of the Fifth Amendment by restricting mothers' insurance benefits to women who were once married to the deceased wage-earners.

2. Whether sovereign immunity bars the award of retroactive monetary relief to persons denied Social Security benefits under a statutory section later held to be unconstitutional.

3. Whether the district court properly certified a nationwide class that includes persons not shown to have met the jurisdictional requirements of Section 205(g) of the Social Security Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Section 202(g)(1) of the Social Security Act, 42 U.S.C. 402(g)(1), provides in pertinent part:

> The widow and every surviving divorced mother (as defined in section 416(d) of this title) of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—
>
> (A) is not married,
>
> (B) is not entitled to a widow's insurance benefit,
>
> (C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,
>
> (D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,
>
> (E) at the time of filing such application has in her care a child or such individual entitled to a child's insurance benefit, and
>
> (F) in the case of a surviving divorced mother—

(i) the child referred to in subparagraph (E) is her son, daughter, or legally adopted child, and

(ii) the benefits referred to in such subparagraph are payable on the basis of such individual's wages and self-employment income

shall * * * be entitled to a mother's insurance benefit * * *.

3. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides in pertinent part:

Any individual, after any final decision of the Secretary made after a hearing to which he was a party * * * may obtain a review of such decision by a civil action * * * . Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business * * *.

4. Section 205(h) of the Social Security Act, 42 U.S.C. 405(h), provides in pertinent part:

The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.

5. Section 216(d)(3) of the Social Security Act, 42 U.S.C. 416(d)(3), provides:

(3) The term "surviving divorced mother" means a woman divorced from an individual who has died, but only if (A) she is the mother of his son or daughter, (B) she legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of 18, (C) he legally adopted her son or daughter while she was married to him and while such son or daughter was under the age of 18, or (D) she was married to him at the time both of them legally adopted a child under the age of 18.

6. Section 216(h)(1)(A) of the Act, 42 U.S.C. 416(h)(1)(A) provides in pertinent part:

An applicant is the * * * widow * * * of a fully or currently insured individual for purposes of this subchapter if * * *, such insured individual is dead, the courts of the State in which he was domiciled at the time of death * * * would find that such applicant and such insured individual were validly married * * * at the time he died. If such courts would not find that such applicant and such insured individual were validly married at such time, such applicant shall, nevertheless be deemed to be the * * * widow * * * of such insured individual if such applicant would, under the laws applied by such courts in determining the devolution of intestate personal property, have the same status with respect to the taking of such property as a * * * widow * * * of such insured individual.

STATEMENT

1. Section 202(g)(1) of the Social Security Act provides benefits to the widow [1] of a wage-earner who dies fully or currently insured under the Act, if she has in her care a child of the wage-earner [2] entitled to a child's insurance benefit, if she is not currently married, and if she is not otherwise entitled to an equal or greater social security benefit. The divorced wife of a deceased insured wage-earner is entitled to monthly benefits under the same conditions, but only if the wage-earner's entitled child in her care also is her own natural or adopted child. 42 U.S.C. 402(g)(1)(F). In order to qualify as the wage-earner's widow, a claimant must generally either have been married to the wage-earner for at least nine months before his death or have had a natural or adopted child with him.[3] 42 U.S.C. 416(c);

[1] This Court held in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), that the benefits of Section 202(g)(1) are available to widowers of female wage-earners. In the interest of clarity, we follow the statute and refer simply to the widow.

[2] The child may be the wage-earner's natural, adopted, or step child, or his grandchild, 42 U.S.C. 416(e). See *Weinberger* v. *Salfi*, 422 U.S. 749 (1975).

[3] A woman may be deemed the widow of the wage-earner even though she was never validly married to him in two circumstances: (1) if she is entitled to the same status as a widow under the intestate succession laws of the state in which the wage-earner was domiciled at the time of his death, or (2) if she in good faith went through a marriage ceremony with the wage-earner that would have resulted in a valid marriage but for a legal impediment of which she was not aware, she was living with the wage-earner when he died, and no one else is or has been entitled to benefits as his widow. 42 U.S.C. 416(h)(1).

Weinberger v. *Salfi*, 422 U.S. 749 (1975). There is no requirement that she be the mother of the entitled child in her care. Although these benefits originally were called "widow's current insurance benefits," the name was changed to mother's benefits in 1950, when protection was first accorded to the "former wife divorced" (now "surviving divorced mother").[4]

An entitled child who is a full time student receives separate benefits until he reaches 22, but the mother's benefit ceases when the child reaches 18. 42 U.S.C. 402(s)(1).[5] A covered person (mother or child) loses her entitlement to benefits if she earns more than a given amount during a particular period, but neither the child's benefit nor the mother's benefit is affected by the earnings of the recipient of the other. 42 U.S.C. 403.

2. Norman W. Boles, an insured wage-earner, died on October 10, 1971. His widow, Nancy L. Boles, and their two children were awarded mother's and chil-

[4] The statutory definitions of "divorced wife" and "surviving divorced wife" apply only to the elderly beneficiaries of wife's and widow's benefits; a divorced person receiving mother's benefits is defined as a "surviving divorced mother." 42 U.S.C. 416(d). 42 U.S.C. 402(g) provides benefits for "the widow or surviving divorced mother" of a wage-earner, but only if she is not entitled to a widow's benefit. Consequently, surviving wives' benefits are provided through the statutory reference to mothers.

[5] If the child is disabled and unmarried, these age limits do not apply. 42 U.S.C. 402(d). See *Califano* v. *Jobst*, 434 U.S. 47 (1977).

dren's insurance benefits. On January 15, 1973, Margaret Gonzales, a woman with whom Norman W. Boles had lived from 1963 to 1966 but whom he had never married,[6] filed claims for mother's insurance benefits for herself, and for children's insurance benefits for her son, Norman J. Boles. The claim for children's insurance benefits was granted under Section 202(d) (42 U.S.C. 402(d)),[7] and the monthly benefits payable to Nancy Boles and her two children were reduced to permit the payment of benefits to Norman J. Boles without exceeding the family maximum allowed under Section 215 (42 U.S.C. 415). The claim for mother's insurance benefits was denied because Gonzales never was married to Boles and therefore did not meet the eligibility requirements of Section 202(g)(1) (J.S. App. 4a-6a).

After exhausting her administrative remedies, Gonzales filed this suit in the United States District Court for the Western District of Texas. The district court certified the case as a class action on behalf of "all illegitimate children and their mothers who are presently ineligible for Mother's Insurance Benefits solely because 42 U.S.C. § 402(g)(1) restricts such benefits to women who were once married to the fathers of their children" (J.S. App. 1a-2a). The

[6] Norman W. Boles married Nancy L. Boles in 1967.

[7] The wage-earner had acknowledged his paternity of Norman J. Boles (J.S. App. 5a). See 42 U.S.C. 416(h)(3); *Mathews* v. *Lucas*, 427 U.S. 495 (1976).

district court then held that "Section 202(g)(1) of the Social Security Act, 42 U.S.C. § 402(g)(1), is unconstitutional and void insofar as it prevents Plaintiffs and the Plaintiff Class from receiving Mother's Insurance Benefits solely on the ground that Plaintiff mothers were never married to the fathers of their children" (J.S. App. 24a).

The court interpreted *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), as holding that mothers' insurance benefits are intended solely as a benefit to the children of the wage-earner. It then concluded that the marriage requirement "encompasses a total exclusion of all illegitimates from Mother's Insurance Benefits and a total inclusion of all legitimate children" (J.S. App. 18a). It held that such a classification violates the equal protection principles discussed in this Court's cases considering statutes dealing with illegitimate children, particularly *Trimble* v. *Gordon*, 430 U.S. 762 (1977), and *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974). The district court permanently enjoined the Secretary from denying benefits to plaintiffs and the plaintiff class on the basis of the marriage requirement, ordered the Secretary to pay mother's insurance benefits to Gonzales and her son retroactive to the date of Gonzales' claim, and directed the Secretary to notify "all illegitimate children receiving Child's Insurance Benefits and their mothers that they are no longer ineligible for Mother's Insurance Benefits solely by reason for the marriage requirement" (J.S. App. 24a-25a).

SUMMARY OF ARGUMENT

I

Congress has used marriage throughout the Social Security Act as a means of determining eligibility for benefits, and this Court has recognized that marriage is a rational criterion on which to base a conclusion of probable dependnce. The marriage requirement serves precisely that function here. Although, as this Court held in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), the mother's insurance benefit is designed to permit the recipient to remain home to care for the entitled child in her care, Congress is entitled to offer that option to the wage-earner's widow or former wife, who is likely to have relied on the wage-earner for support during his lifetime, and not otherwise to the mother of the child to be cared for.

The restrictions on receipt of a mother's benefit reflect the general statutory scheme of relying on relationship to the insured wage-earner to define the categories of beneficiaries entitled to the replacement of lost support. Thus, the child's and the mother's benefit each depend on the beneficiary's relation to the wage-earner, not on their relationship to each other. The mother's benefit is paid to a particular category of spouses—the group that is suddenly required to replace the support presumably lost by the wage-earner's death and needed because of their responsibility for his entitled child. The benefit is not based on a legislative desire to encourage mothers to take care of their own children, or to provide an indirect and erratic economic supplement to the children's benefit.

Of course, because most children are in fact in the care of their mothers, the marriage requirement has an indirect effect on the class of entitled illegitimate children, whose mothers normally cannot qualify for benefits. But that indirect effect is not sufficient to invalidate the rational statutory classification. It does not reflect intentional discrimination against illegitimates.

Even under the intermediate level of scrutiny applicable to classifications based on illegitimacy, the requirement passes constitutional muster. It bears a substantial relation to a legitimate federal interest—the interest in defining, by easily applicable criteria, the categories of beneficiaries most likely to have been dependent on the wage-earner, and then allocating the limited resources of the trust fund in a way that will adequately replace the support lost. The extension of mother's benefits to unmarried mothers would not serve either purpose, since those mothers are, as a class, significantly less likely to have been dependent on the wage-earner than the mothers eligible under the statute, and the extension often would mean, because of the maximum benefit provisions, that inadequate support would be provided to two families rather than adequate support to one.

II

Sovereign immunity bars the payment of retroactive benefits to Gonzales even if the statute is unconstitutional. The United States has not waived its sovereign immunity to permit recoveries of money as an accrued liability for actions taken in reliance on

an unconstitutional statute. Neither Section 205(g) nor Section 204(a) of the Social Security Act authorizes recovery on claims alleging that benefits were denied in accordance with an unconstitutional statutory provision. Section 205(g) is merely a grant of jurisdiction, and Section 204(a) authorizes only payment of past-due benefits to which a claimant was statutorily entitled. Gonzales admittedly was not entitled to benefits under the Act because she was never married to Boles, and she therefore cannot receive retroactive payments.

III

Section 205(g) of the Social Security Act does not authorize class relief. It is particularly inappropriate to provide relief, as did the district court, to the precise class that would be unable to obtain judicial review under Section 205(g) because they have not filed a claim for benefits.

ARGUMENT

I

THE MARRIAGE REQUIREMENT OF ELIGIBILITY DOES NOT UNCONSTITUTIONALLY DISCRIMINATE AGAINST ILLEGITIMATE CHILDREN

This case involves a marriage requirement of a kind that is familiar to the Court. The Social Security Act is replete with requirements based on familial relationship, including marriage, and this Court has reviewed and sustained many of them. See, *e.g.*, *Califano* v. *Jobst*, 434 U.S. 47 (1977); *Mathews* v. *DeCastro*, 429 U.S. 181 (1976); *Weinberger* v. *Salfi*,

422 U.S. 749 (1975). The district court acknowledged the force of these cases but distinguished them on the ground that to make mothers' insurance benefits turn on marriage would be to discriminate against the illegitimate children of the unmarried mothers.

The district court's treatment of a marriage rule as "discrimination" against the illegitimate children of the unmarried mothers has some surface plausibility. After all, it is usually marriage that defines the difference between legitimacy and illegitimacy. There is, consequently, some apparent tension between the line of cases sustaining marriage requirements as rationally related to a legitimate purpose and the line of cases (*e.g.*, *Trimble* v. *Gordon*, 430 U.S. 762 (1977)) subjecting distinctions based on illegitimacy to some enhanced scrutiny. But this case does not present an occasion for the Court to address whatever tension there may be between the two lines of cases. The rationales of the decisions do not come into conflict unless the marriage requirement, as applied to a mother, has a significant or direct effect on the legal rights of the illegitimate child.

The district court found such an effect here because it concluded that the benefits in question, although denominated as mothers' benefits, really are intended for the assistance of the children. Consequently, the district court held, the case must be viewed from the child's perspective and be treated as a distinction based on illegitimacy, rather than from the mother's perspective as a distinction based on marriage to the wage-earner. In the argument that

follows, we show that the district court misunderstood the nature of the benefits in question. This case should be evaluated from the mother's perspective rather than from the child's. So viewed, the statute is constitutional under the Court's analysis in *Jobst*, *DeCastro*, and *Salfi*.

A. The Mother's Benefit Is Designed To Provide Support For The Wage-Earner's Spouse

As this Court frequently has noted, many kinds of "secondary" benefits paid under the complex scheme of the Social Security Act are designed to ameliorate the economic difficulties caused by the loss of earnings when a wage-earner retires or dies. These benefits are paid to "secondary beneficiaries" who become eligible because of their relationship to the wage-earner. The legislative decision to make a particular class of persons eligible usually reflects a determination by Congress that persons in this class are likely to have been dependent on the wage-earner. See, *e.g.*, *Jimenez* v. *Weinberger*, 417 U.S. 628, 634 (1974); *Califano v. Goldfarb*, 430 U.S. 199, 213 (1977) (plurality opinion); *Mathews* v. *DeCastro*, *supra*, 429 U.S. at 185-186; *Califano* v. *Jobst*, *supra*, 434 U.S. at 52. But eligibility does not generally depend on proof of actual dependence. Instead, Congress has established general rules of eligibility that reflect assumptions about the likelihood of dependence for the class as a whole. Although such rules will not accurately reflect actual dependence in every specific case, "[g]eneral rules are essential if a fund of this

magnitude is to be administered with a modicum of efficiency." *Califano* v. *Jobst*, *supra*, 434 U.S. at 53. It is not a constitutional requirement that the statutory classification " 'precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute.' " *Mathews* v. *DeCastro*, *supra*, 429 U.S. at 189. See also *Mathews* v. *Lucas*, 427 U.S. 495, 516 (1976); *Weinberger* v. *Salfi*, *supra*; cf. *Lalli* v. *Lalli*, No. 77-1115 (Dec. 11, 1978). The Due Process Clause of the Fifth Amendment prohibits only the use of classifications that are " 'patently arbitrary' " and " 'utterly lacking in rational justification.' " *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 768. Measured by these well-settled principles, the marriage rule in Section 202(g)(1) is constitutional.

Weinberger v. *Salfi* dealt with the same statute that is at issue here. The Court held that the nine month duration of marriage requirement applicable to a widow with the wage-earner's step child in her care is not inconsistent with the equal protection component of the Due Process Clause. In *Mathews* v. *DeCastro* the Court found no constitutional defect in treating divorced wives of retired wage-earners differently from those who have not been divorced, even though both are caring for his entitled children. Surely persons who were married to the wage-earner are more likely to be dependent in fact than are those who were not. As this Court emphasized in *Califano* v. *Jobst*, *supra*, 434 U.S. at 53, "[b]oth tradition and

common experience support the conclusion that marriage is an event which normally marks an important change in economic status." Cf. *Labine* v. *Vincent*, 401 U.S. 532, 538 (1971). If Congress constitutionally can deny secondary benefits to persons who, like the married or formerly married claimants in *Salfi* and *DeCastro*, were moderately likely to have been dependent on the wage-earner. it surely can deny benefits to a class of never-married persons who were less likely to have been dependent. A woman who never was married to the wage-earner, even though he was the father of their child, is less likely to have been dependent on the wage-earner than was his wife, or even his former wife. If he did not choose voluntarily to support the unmarried mother, in most states she had no legal recourse to compel him to do so.[8]

Furthermore, the denial of benefits to unmarried mothers does not have the defect condemned in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-176 (1972), of imposing legal burdens on the child for the actions of his parents. It simply recognizes that what parents do or do not do can have consequences for the parents themselves. See also *Jimenez* v. *Weinberger*, *supra*, 417 U.S. at 632 (1974).

For these reasons, if the mother's benefit is viewed as providing for those women who, because of their relationship to the wage-earner, were most likely to

[8] In most states she might have required him to support their child but not to support her. This difference is reflected in federal law; a child's eligibility for social security benefits does not depend on his mother's marriage. See 42 U.S.C. 402(d); *Mathews* v. *Lucas*, 427 U.S. 495 (1976).

have been dependent on him for support, the marriage requirement is sufficiently adequate as a means of "filter[ing] out those * * * who are in the factual position which generated the congressional concern" that it passes constitutional muster. See *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 777.[9]

B. The Benefit Is Not Designed To Permit The Entitled Child's Mother To Care For Him

The mother's benefit is designed to replace the support the wage-earner's wife lost by his death, and thus to preserve for her the option of staying home to care for the children who were likewise deprived of his support by his death—whether or not she is the mother of those children, and whether or not those children are legitimate. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648-653 (1975). Here, as in most of the secondary beneficiary classifications, entitle-

[9] The district court concluded (J.S. App. 10a-13a) that the current statute "has no relationship to support requirements" because no proof of support or cohabitation is required as a conditions of entitlement to mothers' benefits. But this analysis overlooks the fact recognized in *Jobst* and other cases that Congress has used simple objective criteria to define the groups entitled to benefits because of their probable dependence, and it has eschewed case-by-case determination of actual dependence on the wage-earner as either a necessary or a sufficient condition of eligibility. Moreover, as Congress has identified specific groups whose probable dependence merits recognition, those groups have been included, even though the resultant pattern of benefits excludes some who might reasonably also have been included. *Califano* v. *Jobst*, *supra*, 434 U.S. at 57-58; *Mathews* v. *DeCastro*, *supra*, 429 U.S. at 189; *Mathews* v. *Lucas*, *supra*, 427 U.S. at 515-516.

ment turns on each beneficiary's relation to the wage-earner, not on the relationship between the beneficiaries.[10]

Contrary to the assumption of the district court, the statute does not reflect a congressional judgment that a child's *mother* should have the option of caring for him or working, coupled with an arbitrary refusal to provide benefits to a mother who was not married to her child's father. Cf. *Gomez* v. *Perez*, 409 U.S. 535, 538 (1973); *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973). The district court's reasoning amounts to saying that the statute is contrary to its own policy. But there is no such peculiarity. Congress gave to wage-earners' wives the

[10] It is true that the entitlement of the "surviving divorced mother" is based on her parentage of the wage-earner's child, a reasonable additional requirement where divorce has severed the family unit. Congress reasonably could conclude that it was unnecessary to provide for the highly unusual situation in which a woman would be caring for the child of her divorced husband who was not her own. Moreover, the eligibility of surviving divorced mothers was originally conditioned on the demonstration that she was receiving, or entitled to receive, substantial contributions to her support from the wage-earner when he died. 42 U.S.C. (1970 ed.) 402(g)(1)(F). That requirement was eliminated in 1972 because Congress concluded that it was inequitable in states in which the divorce laws prohibit alimony, or when a woman accepts a property settlement in lieu of alimony. Pub. L. No. 92-603, Section 114(c), 86 Stat. 1348; H.R. Rep. No. 92-231, 92d Cong., 1st Sess. 54-55 (1971). There is, in any event, no constitutional requirement that a woman who has never married the wage-earner be treated in the same way as one whose marriage to him has ended in divorce. See *Mathews* v. *DeCastro, supra.*

option to forego working. The decision to give the option to wives, regardless of their relation to the entitled children in their care,[11] reflects a rational judgment that a family unit in existence at the wage-earner's death is one meriting consideration, whether or not the children in it are related to the widow.[12] The district court simply disagreed with the congressional judgment about who should be offered the option of remaining at home to care for the entitled child—the wage-earner's spouse or the child's mother. There is no constitutional reason to reject the congressional choice.[13]

Of course, the wage-earner's spouse will normally be the child's parent, as in *Wiesenfeld;* the Court's language there reflected that typical situation. Thus, the Court's conclusion (420 U.S. at 651) that Section 402(g) reflects "the principle that children of covered employees are entitled to the personal attention of the surviving parent if that parent chooses not to work" must be read in the context of the issue

[11] For example, a woman who is caring for her deceased husband's illegitimate child by another woman, or for the child of his first marriage, is entitled to receive mother's benefits.

[12] This statutory scheme cannot be dismissed as the result of drafting inadvertence, because Congress was cognizant of the difference and directed that benefits be paid to a mother with her own child in her care in the case of surviving divorced mothers.

[13] Indeed, requiring that the option be extended to the child's mother who is not the wage-earner's spouse frequently will defeat the fundamental purpose of the benefit. See text at notes 21 and 22, *infra.*

presented in that case: whether the widower, as well as the widow, of the wage-earner was entitled to the option of remaining home to care for the child of their marriage. The Court did not consider, much less decide, whether that option also must be offered to the never-married parent of the wage-earner's child.

The district court's view that the mother's benefit is simply a supplementary benefit for the child is wrong. The benefit is designed to provide the beneficiary with the option of remaining home to care for the entitled child. That is why the Court held in *Wiesenfeld* that the same opportunity must be given to male surviving spouses (see 420 U.S. at 648-653). The statute offers the option to the spouse. No child has a right to insist that his parent take the benefit and stay at home rather than reject the benefit and work. It distorts the statute to read it as expressing a federal policy favoring mothers as the caretakers of their children.

The child has his own, and entirely separate, entitlement to benefits. Appellee Norman J. Boles is receiving such benefits. Because the widow can reject the mother's benefits and elect to work, it would be improper to view the mother's benefit as a separate source of child support. The fact that mothers' benefits really are intended for the benefit of the mother is illustrated by the case of foster homes: a child of a wage-earner living with foster parents still receives a child's benefit, but the foster parent is ineligible for a mother's benefit. This is so even though a child

in foster care may have more need than a child in parental care. See *Miller* v. *Youakim*, No. 77-742 (Feb. 22, 1979).

Moreover, there is no apparent reason why the size of a supplemental children's benefit should vary with the number of children in the household, as does the mother's benefit, which gets smaller as the number of entitled children increase.[14] See pages 28-29, *infra*. In sum, if Congress considered the children's benefit insufficient, it would surely have devised a more direct and reasonable way to supplement it than by providing a mother's benefit.[15]

The legislative history on which the Court relied in *Wiesenfeld* also demonstrates the congressional intent to benefit a particular class of widows considered particularly likely to need the replacement of lost support, rather than to provide an indirect and erratic supplement to the children's benefit. As the Court noted in *Wiesenfeld*, *supra*, 420 U.S. at 649-650, Congress considered in 1939 providing benefits to all widows, but it decided that young widows without children in their care reasonably could be expected to work to support themselves (so they did not receive benefits), and middle-aged widows with grown

---

[14] In addition, although by continuing the children's benefit Congress recognized that the full-time student's need for support between 18 and 22 is as great as that of a younger child, the mother's benefit stops when the child reaches 18. This difference in treatment reflects the fact that, although the child's economic needs have not diminished, there is less need to offer a wife an option to stay home to care for the child.

[15] Extending mother's benefits to natural mothers, as appellees suggest, would not change these effects.

children were likely to have more savings than younger widows, and to be able to look to their children for support (they, too, were not given benefits). Report of the Social Security Board, H.R. Doc. No. 110, 76th Cong., 1st Sess. 7-8 (1939). Accordingly, benefits were provided for only the particular group of widows that Congress concluded should not be required to replace by other means the support they presumably lost on their husbands' deaths.[16] Benefits later were extended to the class of divorced women that Congress deemed to be in essentially the same situation as the young widow with an entitled child in her care—divorced wives receiving, or entitled to receive, substantial support from their former husbands and caring for their natural or adopted children.[17]

[16] The fact that the widow who remarries loses her entitlement to mother's benefits also demonstrates that they were designed to replace the loss of the wage-earner's support, since on remarriage the widow can look to her new husband for support. Similarly, a wife with substantial earnings from her own employment does not receive mother's benefits, since she has herself replaced her lost support. The benefits of entitled children in her care are not affected by these circumstances, since their benefits are independent of hers.

[17] The later elimination of the support requirement for divorced wives was based on considerations unrelated to a belief that any minor child should be entitled to the personal attention of his mother, regardless of her relation to his father (note 10, *supra*).

C. The Eligibility Requirements For Mothers' Benefits Have At Most An Incidental Effect On Illegitimate Children

Although, as we have shown, the mother's benefits are intended to replace the support lost by the wage-earner's wife with an entitled child in her care, the marriage requirement undoubtedly has the incidental effect of denying benefits to many family units containing illegitimate children. We submit that this does not affect the constitutionality of the statute.

A child's own entitlement is defined by a statutory scheme that takes his illegitimacy into account in a way that, this Court held, is constitutionally proper. *Mathews* v. *Lucas*, 427 U.S. 495 (1976). There is no flat denial of benefits to illegitimates, as in, *e.g.*, *New Jersey Welfare Rights* v. *Cahill*, 411 U.S. 619 (1973); *Levy* v. *Louisiana*, 391 U.S. 68 (1968); and *Gomez* v. *Perez*, 409 U.S. 535 (1973).[18]

Moreover, even the incidental advantage ~~of~~ to the household in which a child resides of the payment of mother's benefits is not contingent on legitimacy. Many children, legitimate and illegitimate, receive their own benefits but live in family units headed by persons not entitled to mothers benefits. This may occur when the family head was never married to the wage-earner, when the surviving parent with whom the children live has remarried, and when they live with foster parents. And many illegitimate children live in the same family unit as the wage-earner's

[18] Indeed, appellee Norman J. Boles is receiving a child's benefit based on his father's earnings.

surviving spouse; these illegitimates receive any incidental support that mothers' benefits may provide, as do children living with persons deemed the spouse of the wage-earner by virtue of 42 U.S.C. 416(h)(1) (see note 3, *supra*)).[19] The district court's belief that all legitimate children receive some support from mother's benefits, and no illegitimate children do (J.S. App. 18a), is simply wrong.

In other words, the eligibility of a person for mother's benefits does not turn on the legitimacy of the children in the household. Any effect on illegitimate children as a class caused by the status of their mothers is at most a disproportion unaccompanied by discriminatory motive. Under the standards of *Washington* v. *Davis*, 426 U.S. 229 (1976), the existence of a disproportionate effect on households containing illegitimate children does not show that the statute producing the effect should be subjected to special scrutiny.

[19] Appellees argue (Motion to Dismiss or Affirm at 11 n.1) that only children living with their mothers should be compared. But as we argued at pages 17-22, *supra*, the statute can not reasonably be read as basing entitlement on motherhood.

Appellees also suggest that children legitimated by operation of state law living with their mothers who receive no benefits because they were never married to the wage earners are not "really" legitimate. This argument, like their claim that mother's benefits are "really" children's benefits, simply redefines reality to suit their claims. Even if appellees' definitions of the comparable group are correct, however, the statute does not baldly distinguish between legitimate and illegitimate children, since legitimate children living with their remarried mothers do not have the incidental advantage of mother's benefits, and illegitimate children living with the wage-earner's spouse do. Although the disqualification of the remarried mothers does not result from the marriage requirement at issue here, this Court in *Jobst*, *supra*, 434 U.S. at 55, noted the importance of considering the statutory classification as a whole.

Even if the effect on households containing illegitimate children were intended in some way, however, this would not undermine the validity of the statute. In *Califano* v. *Jobst*, *supra*, 434 U.S. at 58, and *Califano* v. *Aznavorian*, No. 77-991 (Dec. 11, 1978), slip op. 7-8, this Court upheld, against claims that they denied equal protection, statutes that had an incidental effect on constitutionally protected interests—even (in *Jobst*) fundamental ones. Similarly, the incidental disparate effect of this statute on illegitimate children does not deny them equal protection.

D. The Statute Is Substantially Related To Important Goals

If the Court should conclude that the incidental effect of the statutory classification on illegitimate children requires that it be given special scrutiny, the Court nevertheless should hold that the statute does not violate the equal protection component of the Fifth Amendment.

As the district court concluded, several of this Court's recent decisions suggest that in evaluating statutory classifications based on illegitimacy, a somewhat closer scrutiny than that traditionally applied to laws regulating economic and social conditions may be appropriate. See, *e.g.*, *Trimble* v. *Gordon*,

supra. But see *Mathews* v. *Lucas*, *supra*, 427 U.S. at 505.[20] But this Court has declined all invitations to subject such classifications to the "strict" scrutiny required when "suspect" classifications are involved. See, *e.g.*, *Mathews* v. *Lucas*, *supra*, 427 U.S. at 505; *Trimble* v. *Gordon*, *supra*, 430 U.S. at 766-767; *Lalli* v. *Lalli*, *supra*, plurality slip op. 5. Classifications based on legitimacy thus sometimes may be justified by the practical need of legislators to make classifications that deal with broad groups of persons and omit case-by-case decisionmaking. *Lalli* v. *Lalli*, *supra*, plurality ship op. 13. Cf. *Vance* v. *Bradley*, No. 77-1254 (Feb. 22, 1979), slip op. 14-15. As the Court explained in *Mathews* v. *Lucas*, *supra*, 427 U.S. at 509-510 (citations omitted):

> In cases of strictest scrutiny, such approximations must be supported at least by a showing

[20] The Court in *Lucas* refused to treat illegitimacy as a constitutionally suspect classification meriting the strict scrutiny applied to classifications based on race or national origin, stating (427 U.S. at 505) that "we have had no difficulty in finding the discrimination [against illegitimates] impermissible on less demanding standards than those advocated here." Although that language is consistent with the application of an intermediate test for classifications involving illegitimacy, the Court in *DeCastro*—a case involving a neutral classification—referred to *Lucas* as demonstrating "the standard by which legislation such as this must be judged" (429 U.S. at 181). The plurality opinion in *Lalli* v. *Lalli*, *supra*, later cited *Lucas* as applying an intermediate standard to classifications involving illegitimacy (plurality slip op. 5). The cases thus continue to support Mr. Justice Rehnquist's observation in dissent in *Trimble*, *supra*, 430 U.S. at 781, that "the unanswered question remains as to the precise sort of scrutiny to which classifications based on illegitimacy will be subject."

> that the Government's dollar "lost" to overincluded benefit recipients is returned by a dollar "saved" in administrative expense avoided. Under the standard of review appropriate here, however, the materiality of the relation between the statutory classifications and the likelihood of dependency they assertedly reflect need not be " 'scientifically substantiated.' " Nor, in any case, do we believe that Congress is required in this realm of less than strictest scrutiny to weigh the burdens of administrative inquiry solely in terms of dollars ultimately "spent," ignoring the relative amounts devoted to administrative rather than welfare uses. Finally, while the scrutiny by which their showing is to be judged is not a toothless one, the burden remains upon the appellees to demonstrate the insubstantiality of that relation.

In sum, even in cases involving statutes that impose direct, rather than incidental, burdens on illegitimates, the Court "does not focus on the abstract 'fairness' of [the challenged] law, but on whether the statute's relation to the [governmental] interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the [Fifth] Amendment." *Lalli* v. *Lalli*, *supra*, plurality slip op. 13. The question is simply whether the statutory provisions concerning illegitimate children "bear an evident and substantial relation to the particular [federal] interests this statute is designed to serve." *Id.* at 8. In light of *Mathews* v. *Lucas*, *supra*, the particular classification at issue here meets this test.

In *Mathews* v. *Lucas* the Court concluded that the statutory classifications under consideration are permissible "because they are reasonably related to the likelihood of dependency at death" (427 U.S. at 509). The classifications here are permissible for the same reason, which this Court has repeatedly recognized as proper: they allocate the available resources of the trust fund among those categories of beneficiaries most likely to have suffered economically from the wage-earner's death, in a manner that will adequately replace the support they have lost.

As part of this allocation of the trust fund among many potentially deserving groups, Congress has determined that it is necessary to limit the total amount payable monthly to any one wage-earner's survivors.[21] Thus, each additional person who becomes eligible for benefits on the wage-earner's account, after that maximum is reached, receives his share by cutting the same pie into smaller slices. If, as here, eligible beneficaries live in different households, the addition of a new beneficiary in one household will lead to a reduction in benefits to the other. This may jeopardize the achievement of Congress' primary objective in providing the mother's benefit, because monthly payments to either household may become so low that *no* recipient has the option of staying home to care for the entitled children in her care.[22]

[21] The maximum amount available depends on the size of the wage-earner's "primary insurance amount," which in turn depends on the amount and duration of his earnings in covered employment. See 42 U.S.C. 415(a).

Setting the proper balance between the competing goals of assisting all those likely to have been dependent on the wage earner, providing benefits large enough to achieve the statutory purpose, and remaining within the fiscal limitations of the fund is peculiarly a legislative matter. As in *Mathews* v. *Lucas*, *supra*, 427 U.S. at 516: "In the end, the precise accuracy of Congress' calculations is not a matter of specialized judicial competence; and [this Court has] no basis to question their detail beyond the evident consistency and substantiality." Appellees do not contend that the statutory classification is irrational—indeed, they concede (Motion to Dismiss or Affirm at 18-19) that illegitimate children are less likely than legitimate ones to have been supported by their

[22] This point may well be reached in this case if mother's benefits are paid to appellee Gonzales. Given Norman W. Boles' earnings record (Tr. 44), the maximum amount payable on his account since June 1978 has been $322.00 each month. Without the payment of benefits to appellee Gonzales, each of the secondary beneficiaries receives $80.50, making the total monthly payment $241.50 to the three members of Nancy Boles's household (one mother's benefit and two children's benefits) and $80.50 to Norman J. Boles. If Gonzales also must be paid out of this maximum, the total payments to each of the other beneficiaries will be reduced by 20%, so that Nancy Boles's household will receive $193.20 and the Gonzales household $128.80. Although the increase in income to the Gonzales household would hardly be enough to permit Gonzales to subsist without other sources of income, the decrease in the Boles household's income might well mean that Nancy Boles no longer could remain home to care for the two entitled children in her care.

fathers. *A fortiori*, the mothers of illegitimate children, the claimants directly affected by the marriage requirement, are less likely to have been supported than the wage-earner's wife or former wife. That should be the end of the matter.

Appellees argue, however, that the statute is unconstitutional not only because it excludes all illegitimate children and benefits all legitimate ones (an analysis we have shown above to be defective) but also because, unlike the children's benefit requirements considered in *Lucas*, the bar is absolute—there is no way that Gonzales can qualify for benefits by proving her dependence. This analysis is unpersuasive. Although it is true that the Court in *Lucas* found it significant that illegitimate children could qualify for benefits by proving their dependence (427 U.S. at 512),[23] this Court recognized in *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 772, that:

> benefits [under the Social Security Act] are available upon compliance with an objective criterion, one which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. * * * [A]ppellees are completely free to present evidence that they meet the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test.

[23] In *Jimenez* v. *Weinberger*, 417 U.S. 628, 634 (1974), the Court similarly emphasized that the child denied benefits because of his illegitimacy was absolutely barred from proving his dependence after the wage-earner became disabled.

Appellees' claim that this principle is inapplicable to classifications bearing on legitimacy is refuted by *Lalli* v. *Lalli*, *supra*, in which the Court upheld against an equal protection challenge a statute that absolutely barred an illegitimate child from inheriting from his natural father by intestate succession unless, during the father's lifetime, a court of competent jurisdiction had entered an order of filiation declaring his paternity. In the absence of such an order, the child was as certainly barred (after the father's death) from proving his entitlement as the child in *Trimble*, or as the child in *Jimenez* after his natural father's disability. The constitutional distinction between the statutes involved in *Lalli* and *Lucas* on the one hand, and *Trimble* and *Jimenez* on the other, is not whether the statutory bar is (or can become) insurmountable, but whether the affected class is irrationally broad in light of the statutory purposes. Given the necessity of balancing the competing legislative purposes we have discussed above, and the fact that Congress has recognized the needs of dependent illegitimate children in prescribing the eligibility provisions for children's benefits, Congress' determination that women who have at some time been married to the wage-earner are more likely to have been dependent on him than those who have not can scarcely be considered the sort

of irrationally broad disqualification struck down in *Jimenez*, *Trimble*, and similar cases.[24]

II

RETROACTIVE MONETARY RELIEF IS BARRED BY SOVEREIGN IMMUNITY

If the Court should disagree with our contention that the marriage requirement of 42 U.S.C. 402(g) is constitutional, it then would have to determine whether the district court was authorized to order the United States to pay mother's benefits to Gonzales retroactive to January 15, 1973, the date on which she filed her claim (J.S. App. 5a, 24a). For the reasons that follow, we submit that it was not.

This Court has held that monetary relief for past harms is not available against the United States unless Congress has determined that such relief is

[24] Appellees also assert (Motion to Dismiss or Affirm at 12-13) that "[t]his Court now permits disparate treatment of illegitimates only in situations which involve the special considerations applicable to proof of paternity," citing *Lalli* and *Lucas*. Neither case suggests such an absolute rule. Although the primary justification for the special condition for inheritance by intestate sucession imposed on illegitimates in *Lalli* was the possibility of fraudulent claims, nothing in the plurality's opinion indicates that this is the *only* possible justification for distinguishing between illegitimate and legitimate children. *Lucas* refutes any such claim, since the classifications there were justified not on the basis of the need to prove paternity, but "because they are reasonably related to the likelihood of dependency at [the wage-earner's] death" (427 U.S. at 509). Indeed, the claimed denial of equal protection in *Lucas* related only to those children, like the appellee Lucas, whose "paternity was clear." *Id.* at 502.

appropriate, *i.e.*, unless Congress has waived the government's sovereign immunity. *United States* v. *Testan*, 424 U.S. 392 (1976).[25] The waiver must be clear and explicit.

Congress has not authorized the payment of money to Gonzales. To the contrary, Congress, by enacting the marriage requirement of Section 402(g), explicitly prohibited the payment of money to persons such as Gonzales who have never been married to the wage-earner on whose account they claim entitlement. If the Court should hold that Section 402(g) is unconstitutional, that would remove the prohibition, but it would not create a statutory authorization for retroactive payments. Such an award would be permissible only if some other provision of the statute authorized it.

There is no such provision. Like the Tucker Act provision reviewed in *Testan*, Section 205(g) of the

[25] Appellees contend that a claim of sovereign immunity may be waived by the failure of the responsible government official to raise it in the answer to the complaint. But the requirement that *Congress* waive the government's sovereign immunity distinguishes this case from cases involving foreign sovereigns, and from the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, on which appellees rely (Motion to Dismiss or Affirm at 27). Congress has concluded that a foreign state implicitly waives its sovereign immunity by filing a responsive pleading, thus indicating its intent to subject itself to the domestic courts of this country. But the United States Attorney's responsibiliy for representing the federal government in its own courts does not similarly empower him to waive its sovereign immunity. That is a privilege reserved to Congress itself. See *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940), and cases there cited.

Social Security Act (42 U.S.C. 405(g)) merely gives district courts jurisdiction to hear certain cases; it does not create a substantive right to a monetary remedy whenever the government withholds benefits in accordance with a statutory provision later held unconstitutional. See *DeLao* v. *Califano*, 560 F.2d 1384, 1389-1391 (9th Cir. 1977); *Tatum* v. *Mathews*, 541 F.2d 161, 165-166 (6th Cir. 1976); *Johnson* v. *Mathews*, 539 F.2d 1111, 1122-1125 (8th Cir. 1976).

No other provision of the Social Security Act may "'fairly be interpreted as mandating compensation by the Federal Government for the damage sustained'" (*United States* v. *Testan*, *supra*, 424 U.S. at 400).[26] It would be hard to argue that the Act, which in Section 402(g) explicitly conditions payments on marriage to the wage-earner, simultaneously authorizes payments to persons who do not meet this requirement. There is no provision stating that, if a portion of the statute prohibiting payment is declared invalid, then payment is deemed authorized.

The closest thing to such a provision is Section 204(a) of the Act, 42 U.S.C. 404(a), which directs the Secretary to make retroactive payments to persons wrongfully denied benefits to which they were statutorily entitled. There is a critical distinction, however, for purposes of Section 204(a), between administrative decisions that comported with basic statutory rules and decisions that violated the statute. If the Secretary should misinterpret or misapply the statute, Section 204(a) authorizes a court to order the Secretary to pay retroactive benefits. That judicial order carries out the statutory plan and corrects the Secretary's error. It requires the payment of benefits that Congress itself wanted to be paid. Here, however, the Secretary acted in accordance with Congress' plan; this case does not involve an order to the Secretary to pay benefits that Congress wanted to be paid. Appellees received the "correct amount of payment" within the meaning of Section 204(a), and no relief is required by that statute. In other words, Section 204(a) creates a remedy for an administrative violation of the statute but not for a deficiency in the statutory plan itself.[27] This Court has repeatedly stated that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969); *United States* v. *Testan*, *supra*, 424 U.S. at 399; *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). In light of this general principle, Section 204(a) should not be construed to authorize retroactive payments to persons to whom the statute explicitly denies benefits. Congress simply has not provided for retroactive payments under Section

[26] The Due Process Clause itself is not a waiver of sovereign immunity. See *Duarte* v. *United States*, 532 F.2d 850, 852 (2d Cir. 1976).

[27] *Tatum* v. *Mathews*, *supra*, and *Johnson* v. *Mathews*, *supra*, held that Social Security claimants had been denied procedural due process in connection with the termination of their SSI benefits, but that only claimants found statutorily eligible for benefits could obtain retroactive relief under 42 U.S.C. 1383(b), the section analogous to Section 204(a).

204(a) where claimants cannot establish statutory eligibility for such payments. Cf. *Edelman* v. *Jordan*, 415 U.S. 651 (1974) (distinguishing between the award of an accrued monetary liability for past wrongs and prospective relief with monetary consequences); *Milliken* v. *Bradley*, 433 U.S. 267, 288-290 (1977) (same).

To be sure, this Court, without mentioning the sovereign immunity problem, has occasionally approved the payment of benefits as an accrued liability in the course of affirming decisions that had invalidated Social Security provisions on constitutional grounds. See, *e.g.*, *Califano* v. *Goldfarb*, *supra*, affirming 396 F. Supp. 308 (E.D.N.Y. 1975); *Weinberger* v. *Wiesenfeld*, *supra*, affirming 367 F. Supp. 981 (D. N.J. 1973). But because the problem was not briefed, and the cases do not discuss it, they do not preclude the Court from now holding that retroactive relief is impermissible. In recognizing the states' Eleventh Amendment immunity from retroactive monetary relief in *Edelman* v. *Jordan*, *supra*, the Court explicitly departed from four previous cases (including one decided after plenary consideration) that had approved such relief without explicitly considering the Eleventh Amendment problem (415 U.S. at 670-671).[28]

[28] See also *Stone* v. *Powell*, 428 U.S. 465, 480-481 and nn. 14, 15 (1976); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952); *Webster* v. *Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents").

III

THE DISTRICT COURT LACKED AUTHORITY TO AWARD RELIEF TO A NATIONWIDE CLASS INCLUDING PERSONS WHO HAVE NOT FILED ANY CLAIM WITH THE SECRETARY

We have argued in *Califano* v. *Elliott*, cert. granted No. 77-1511 (Oct. 2, 1978), that district courts in social security cases may adjudicate only the claims of the named plaintiff and may not award injunctive relief to a nationwide class. The arguments we make at pages 54-76 of our brief in *Elliott* apply to this case as well, and we rely on them here.[29]

Appellees assert, however, that "[r]egardless of whether class relief is authorized in suits relying solely on 42 U.S.[C.] § 405(g) * * * jurisdiction as to the class herein exists under 28 U.S.C. § 1331, as a constitutional claim is asserted" (Motion to Dismiss or Affirm at 23). That is precisely the contention the Court rejected in *Salfi*, *supra*, 422 U.S. at 760-761, concluding: "the third sentence of [42 U.S.C.] 405 (h) precludes resort to federal-question jurisdiction for the adjudication of appellees' constitutional contentions."

Appellees nevertheless maintain that *Salfi* held only that Section 205(h) is the exclusive jurisdictional basis for actions challenging the denial of benefits, and that Section 205(h) does not preclude Section 1331 jurisdiction where the only relief claimed on behalf of the class is that the Secretray notify the

[29] We have sent appellees a copy of our brief in *Elliott*.

class members that their failure to marry the wage-earner no longer rendered them ineligible for mother's benefits (Motion to Dismiss or Affirm 23-24). This contention not only is unsupported by the record but also is analytically unsound.

The prayer for class relief in appellees' complaint (App. A, *infra*) tracked the one described in *Salfi*. Here, as there, appellees "sought declaratory relief against the challenged statute, and injunctive relief restraining appellants from denying mother's * * * benefits on the basis of the statute." 422 U.S. at 755. In addition, like the plaintiffs in *Salfi*, appellees here originally sought the payment of benefits to the class members. Only later did they change their prayer to a request that the district court require individual notice of eligibility to class members (App. B, *infra*).[30] The change of prayer is quite unimportant; under Fed. R. Civ. P. 54(c), a party may obtain any relief to which he is entitled. The pleadings do not shape the relief and thus do not affect jurisdiction. The pleadings did not limit the relief here. The entire class is the beneficiary of the declaratory judgment and injunction (J.S. App. 24a). The Secretary not only must notify the class of eligibility but must grant any claim for benefits. Any difference between an injunction to pay, on the one hand, and a notice requirement coupled with a declaratory judgment and injunction that cut off any defense to non-payment, on the other, is little more than a matter of form.

The plaintiffs in *Salfi* sought injunctive and declaratory relief substantially identical to the relief sought here, and the Court held that 28 U.S.C. 1331 did not grant jurisdiction. The fact that appellees ultimately sought only to require the Secretary to notify the class of eligibility does not make the case any less one involving a "claim arising under" Title II of the Social Security Act, 42 U.S.C. 405(h), since the class members' right to any relief turns on the interpretation of the Social Security Act as surely as did the class claim in *Salfi*.

Moreover, if Section 205(h) were read to allow Section 1331 jurisdiction of claims for "notice" relief, but to forbid jurisdiction of claims for other relief, the resulting pattern of judicial review would be odd indeed. The second sentence of Section 205(h), together with Section 205(g), bars all actions for review of nonfinal decisions of the Secretary. It is clear

[30] The district court granted the declaratory and injunctive relief requested by appellees. Appellees correctly point out (Motion to Dismiss or Affirm at 22) that this particular class relief no longer will have any practical effect, for this Court's decision will control the Secretary's interpretation of Section 202(g)(1) as applied to all class members. The granting of this broad relief was, however, inappropriate for the reasons noted in our brief in *Elliott* at 75-76.

Appellees imply (Motion to Dismiss or Affirm at 24) that the individual notice requirement will not impose an onerous burden on the Secretary. This is incorrect. The computerized information concerning current recipients of children's benefits does not reflect whether the child is illegitimate. Thus, complying with the district court's order concerning notice to the children in the class would require manual review of the millions of files of beneficiaries of children's benefits. The files would not accurately disclose the adult members of the appellee class, since the illegitimate entitled child's file often does not reveal whether he is living with his mother.

beyond debate that that sentence prohibits such actions from being brought under other statutory provisions: it expressly allows review of such actions only "as herein provided," *i.e.*, as provided by Section 205(g). Thus a claimant who has obtained an initial or interim adverse decision by the Secretary may not file suit until he has exhausted his administrative remedies; and once he has exhausted his remedies, review is available only under Section 205(g) and not otherwise. But under appellees' argument the federal district courts would have Section 1331 jurisdiction over suits brought by persons who have not filed a claim with, or obtained an initial decision from, the Secretary. In other words, appellees' argument resolves into the contention that Congress intended to permit class actions only with respect to claims concerning which there had been no findings of fact or decisions by the Secretary, *i.e.*, only with respect to the claims least ripe for judicial review. That anomalous result would advance no sound policy. There is no reason to conclude that Congress intended it.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

HARRIET SHAPIRO
Assistant to the Solicitor General

WILLIAM KANTER
SUSAN A. EHRLICH
Attorneys

MARCH 1979

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed, Jun. 10, 1977, Dan W. Benedict, Clerk]

Civil Action No. A 77 CA 104

NORMAN J. BOLES, MARGARET GONZALES, on behalf of themselves and all those similarly situated,
PLAINTIFFS

vs.

JOSEPH CALIFANO, Secretary, U.S. Department of of Health, Education and Welfare, DEFENDANT

COMPLAINT

* * * * *

WHEREFORE, Plaintiffs, having no adequate remedy at law, respectfully pray that this Court;

A. Certify this matter as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;

B. Enter a declaratory judgment that 42 U.S.C. Section 402(g)(1) is unconstitutional insofar as it prevents Plaintiffs and the Plaintiff class from receiving Mother's Insurance Benefits on the ground that Plaintiff mothers were never married to the fathers of their children;

C. Enter a permanent injunction restraining the Defendant from denying benefits to Plaintiff class on the basis of the invalid limitation;

D. Enter an order requiring the Defendant to make payment of Mother's Insurance Benefits to the named Plaintiffs and to all members of the class;

E. Enter an order regarding the payment of attorneys' fees and costs of suit;

F. Provide such other and further relief as shall be necessary and proper.

HERBERT SEMMEL
Center for Law and Social Policy
1751 N. Street, N.W.
Washington, D.C. 20036
(202) 872-0670
REGINA LYNN ROGOFF
Legal Aid & Defender Society of Travis County, Texas
1713 East 6th Street
Austin, Texas 78702
(512) 476-6321

Attorney for Plaintiffs

/s/ Regina Lynn Rogoff
REGINA LYNN ROGOFF

DATED:

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. A-75-CA-171

and

Civil Action No. A-77-CA-104

NORMAN J. BOLES, MARGARET GONZALES, on behalf of themselves and all others similarly situated
PLAINTIFFS

v.

JOSEPH CALIFANO, Secretary, United States Department of Health, Education and Welfare

MOTION TO AMEND PRAYER FOR RELIEF OF THE COMPLAINTS

Plaintiffs move to amend their complaints in both of the above cases, deleting from the prayer for relief paragraph D to the extent it seeks payment of Mother's Insurance Benefits to members of the plaintiff class, other than named plaintiffs and substituting therefore the following:

D. Enter an order requiring defendant to make payment of Mother's Insurance Benefits to the named plaintiffs Boles and Gonzales and requiring defendant to notify all members of the plaintiff class that they are no longer ineligible for Mother's Insurance Benefits solely because the mothers in the class were never married to the fathers of the children in the class, and advising members of the class of their right to apply for Mother's Insurance Benefits.

The amendments conform the pleadings to the decision of the Supreme Court in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975) which held that suits to require *payment* of Social Security benefits could only be brought after exhaustion of administrative remedies. Named plaintiffs have exhausted all administrative remedies, but many members of the plaintiff class have not done so, in large part because they have been advised by the Social Security Administration that they are not entitled to any Mother's Insurance Benefits. The purpose of the class relief sought is to advise potential applicants of their right to file for Mother's Insurance Benefits if the discrimination against illegitimate children is held unconstitutional herein.

REGINA ROGOFF
Legal Aid Society of Travis County, Texas
1713 E. 6th Street
Austin, Texas 78702
512-476-6321

HERBERT SEMMEL
CAROL OPPENHEIMER
Center for Law and Social Policy
1751 N Street, N.W.
Washington, D.C. 20036
202-872-0670

By: _____

DATED:

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 288206 355